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RECENT DECISIONS.

ADMIRALTY—SALVAGE—DUTIES SAVED TO THE UNITED STATES.—Merchandise on which the duty had been paid was rescued from fire while on board a lighter in the possession and under the control of the custom officers. Under such circumstances the Secretary of the Treasury was authorized, U. S. Rev. Stat. §2984, to refund the duty paid. *Held*, that the federal government was liable for salvage on the duty paid. *U. S.* v. *Cornell Steamboat Co.* (1906) 26 Sup. Ct. 648.

Although the court refused in so many words to determine whether mandamus would lie against the Secretary to compel him to refund, it bases its decision on the assumption that the Secretary would, acting in good faith, return the money, citing to support the right to rely on such assumption cases which make statutes in words permissive, mandatory. *Supervisors* v. *U. S.* (1866) 4 Wall. 435. The court seemed reluctant to expressly overrule *D. M. Ferry Co.* v. *U. S.* (1898) 85 Fed. 550, which held the Secretary to be final arbiter in a similar case, yet that is the effect of its decision. The reasoning of the court is unsatisfactory, and its decision is difficult to reconcile with the rule of law which denies salvage on unpaid duties saved to the government when dutiable goods coming into port are rescued from destruction.

AGENCY—UNDISCLOSED PRINCIPAL—PARTICIPATION IN THE TRANSACTION.—The defendant's son applied to the plaintiff for a loan without notifying the plaintiff that he was acting for the defendant. The plaintiff refused to make the loan unless the defendant would indorse her son's note, which she accordingly did. *Held*, the defendant incurred no liability as an undisclosed principal. *Brown* v. *Tainter* (1906) 99 N. Y. Supp. 1030.

The doctrine of undisclosed principal originating from equitable considerations, Y. B. 34 and 35 Edw. 1 pp. 566–569, has come to be based upon the theory of an identity of agent and principal, and, therefore, a meeting of minds between the third party and the principal. Huffcut, Agency §120. In the principal case the participation of the defendant in the transaction was considered incompatible with her being an undisclosed principal. This idea is not supported by any citation. The only decisions bearing any possible analogy refuse a recovery where the third party has shown his intention of dealing with the agent alone, or at least, not with the principal, thus repelling the doctrine of the meeting of minds. *Winchester* v. *Howard* (1867) 97 Mass. 503. But there is nothing inconsistent in the defendant's being secondarily liable on the note and primarily on the debt. The principal case with facts bringing it within the general rule and within no admitted exception is unsound.

CARRIERS—STATUS OF STATEROOM BAGGAGE.—A steamship company limited its liability for baggage by express contract. Plaintiff, having lost through the carrier's negligence, two suit cases intended to be kept in his stateroom, sued for their value on the theory that such articles were not within the contemplation of the limiting clause of the contract. *Held*, the plaintiff could recover. *Holmes* v. *Steamship Co.* (1906) 184 N. Y. 284. See NOTES, p. 527.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REGULATION.—A Texas statute imposed a penalty upon railroad companies for failure to furnish cars to a shipper within a certain time after the latter's requisition in writing, admitting of no excuse except such as arose from "strikes" or "other public calamity." *Held*, that when applied to interstate shipments, such a statute making no provision for contingencies such as extraordinary traffic was an unconstitutional regulation of interstate commerce. *Houston & Texas Central R. R.* v. *Mayes* (1906) 26 Sup.

Ct. 491. A state corporation commission ordered an interstate railroad to deliver cars containing interstate shipments beyond its right of way to a private siding. *Held*, that such an order was an unlawful interference with interstate commerce. *McNeill* v. *So. R. R.* (1906) 26 Sup. Ct. 722.

Undoubtedly a state may, by virtue of its police power, exercise an indirect control over interstate commerce in the interest of the public welfare and safety. *Lake Shore & M. S. R. R.* v. *Ohio* (1899) 173 U. S. 285; *Morgan's Steamship Co.* v. *Louisiana Board of Health* (1886) 118 U. S. 455. While in the nature of things the exact limit of state regulation cannot be defined, the general rule is that state control may not exceed the reasonable requirements of the case, *Cleveland, etc. R. R.* v. *Illinois* (1900) 177 U. S. 514, so as to directly burden or impede interstate traffic. *Ill. Cent. R. R.* v. *Illinois* (1896) 163 U. S. 142. The attempted regulations in the principal cases were clearly beyond the province of state authority. See 5 COLUMBIA LAW REVIEW 298.

CONSTITUTIONAL LAW—TAXATION OF ROLLING STOCK.—Although a large proportion of the relator's cars were outside of its home state constantly, yet all of its cars were within the state some time during the tax year. The relator for this absent proportion claimed a deduction from a tax assessed on the value of all its cars. The proportion was not shown to be taxable elsewhere. *Held*, that a franchise tax law making no provision for such a deduction was constitutional. *N. Y. ex rel N. Y. C. & H. R. R. R.* v. *Miller* (1906) 26 Sup. Ct. 714.

Since the tax was a tax on the franchise of the corporation the principal case is sound. It is thus distinguishable from *Union Ref. Transit Co.* v. *Kentucky* (1905) 199 U. S. 194, in which the tax was one on property. Judson, Taxation §§17, 18. The argument of the court that if this were a tax on property the decision would be the same is inconsistent with a natural interpretation of its holding in *Union Ref. Transit Co.* v. *Kentucky*, supra, which would seem to hold that a proportion of constantly shifting cars which is out of the state all the time is property permanently out of the jurisdiction. 6 COLUMBIA LAW REVIEW 190. The strict construction of the principal case that property of this kind is permanently out of the state only when made up of cars each one of which is out of the state all the time, is to be regretted, and unless the court follows out its intimation that if the property were shown to be taxable elsewhere the rule of average of habitual use would be followed, see Judson, Taxation §221, will lead to double taxation.

CONTRACTS—STATUTES—CONSTRUCTION OF INCONSISTENT CLAUSES.—A contract contained inconsistent clauses. *Held*, "It is a well-settled principle of construction that if two clauses are repugnant and cannot stand together, the first will stand and the last will be rejected." *Employers' Liability Assur. Corp.* v. *Morrow* (1906) 143 Fed. 750. A statute contained inconsistent clauses. *Held*, "Another well-settled rule of construction applicable to these cases is that, where there is an irreconcilable conflict between the different parts of the same act, the last in order of arrangement will control." *United States* v. *Jackson* (1906) 143 Fed. 783.

These so-called rules, while often quoted, are not law. An examination of the decisions shows that in construing a contract or statute the court, as in the principal cases, always tries to give effect to the intention of the parties, or to the legislative will, as expressed in the entire instrument or act. *Smith* v. *Davenport* (1852) 34 Me. 520; *District Township of Dubuque* v. *Dubuque* (1858) 7 Iowa 262. So the courts do not hesitate to disregard a prior clause in a contract, *Heywood* v. *Perrin* (Mass. 1830) 10 Pick. 228, or a subsequent clause in a statute, *Attorney General* v. *Plank Road Co.* (1851) 2 Mich. 138, when it conflicts with the intent as gathered from the whole contract or statute.

CRIMINAL LAW—ATTEMPTS—RECEIVING PROPERTY KNOWING IT TO BE STOLEN.—A clerk, while stealing goods from a store for the purpose of selling them to the defendant, was apprehended and confessed. After

the owner had recovered the goods he directed the thief to sell them to the defendant that the latter might be entrapped. The defendant bought the goods believing them to be stolen and was subsequently indicted for feloniously receiving property knowing it to be stolen. *Held*, the defendant must be discharged upon the indictment, conviction for an attempt to commit the crime charged being error. *People* v. *Jaffe* (N. Y. 1906) 78 N. E. 169. See NOTES, p. 525.

CRIMINAL LAW—HOMICIDE—BURDEN OF PROOF.—In a trial for murder the lower court gave the following instruction: "If the homicide is proven to have been committed by the defendant, then the presumption of murder in the second degree arises against the defendant, and the burden of proof rests upon him to make such defense as will reduce the crime below such degree, or as will justify the act," instead of giving an instruction requested by the defendant that evidence of self defense "throws upon the state the burden of proving criminal intent beyond a reasonable doubt, and the accused is not required to sustain such defense by preponderance of testimony." *Held*, upon writ of error, that the lower court instructed correctly. *State* v. *Trail* (W. Va. 1906) 53 S. E. 17.

A presumption is not evidence and disappears upon production of evidence in rebuttal, *Agnew* v. *U. S.* (1896) 165 U. S. 36; so that if the rebutting evidence raises a reasonable doubt, this doubt by the very fundamental rule of criminal law must be entirely overcome and not simply met by a preponderance of evidence as held in the principal case. It seems that the reason for the court's error is lack of differentiation of "burden of proof" from "burden of producing evidence." Wigmore, Ev. §§2485, 2487.

CRIMINAL LAW—RIGHT OF SHERIFF TO SHOOT FLEEING MISDEMEANANT.—A sheriff in pursuit pointed his revolver at a fleeing misdemeanant. The fugitive then drew his revolver and upon the sheriff firing fired in return. The sheriff was killed in an interchange of shots which followed. *Held*, that the court below was right in instructing the jury that the defendant must be convicted of manslaughter at least, thus excluding the element of self defense. *State* v. *Durham* (N. C. 1906) 53 S. E. 720.

Although an officer may use violence where this alone will stop a felon in his flight, *State* v. *Roane* (N. C. 1828) 2 Dev. 58, he may not use violence in arresting a misdemeanant except in meeting violence. *Thomas* v. *Kinkead* (1892) 55 Ark. 502. Therefore when the misdemeanant flees the officer may not use violence in pursuit, *Sossamon* v. *Cruse* (1903) 133 N. C. 470, and if he does, and the misdemeanant is killed, it is murder, or manslaughter at least, Foster's Crown Law 271; *State* v. *Sigman* (1890) 106 N. C. 728, since by such act of violence the officer forfeits the special protection of the law. The fugitive may therefore resist him as a common assaulter. Foster's Crown Law 319. The holding in the principal case is unsound in principle and is based on an apparently erroneous interpretation of *State* v. *Horner* (1905) 139 N. C. 603, as involving a fleeing from arrest.

DOMESTIC RELATIONS—HUSBAND AND WIFE—TORTS OF HUSBAND—ACTION BY WIFE AFTER DIVORCE.—The plaintiff, wife of the defendant, after procuring a divorce, sued the defendant for an assault committed by him during coverture. *Held*, the plaintiff had no cause of action. *Strom* v. *Strom* (Minn. 1906) 107 N. W. 1047.

Probably the reason that suits of this character continue to be brought in the face of such an unbroken array of opposing authorities is the idea that by virtue of the Married Women's Acts "the rules of the common law on this subject have succumbed to more liberal and just views, like many other doctrines of the common law which could not stand the scrutiny and analysis of modern civilization." *Schultz* v. *Schultz* (1882) 27 Hun. 26, 33; overruled in 89 N. Y. 644. The uniform denial of the wife's right to bring such an action has been upheld on the grounds that husband and wife were one, *Phillips* v. *Barnet* (1876) L. R. 1 Q. B. D. 436; that the

remedy by divorce or other actions was adequate, *Abbott* v. *Abbott* (1877) 67 Me. 304; and that it would be contrary to public policy. *Bandfield* v. *Bandfield* (1898) 117 Mich. 80. See *Peters* v. *Peters* (1875) 42 Iowa 182.

EQUITY—SPECIFIC PERFORMANCE—STATUTE OF FRAUDS.—The plaintiff entered into an oral lease, depositing a part payment of rent. There was a subsequent disagreement as to the terms, and the plaintiff moved in without settling the dispute. The defendant having refused to agree to the longer period claimed, the plaintiff brought suit for specific performance. *Held*, the agreement would not be enforced. *Czermak* v. *Wetzel* (1906) 100 N. Y. Supp. 167. See NOTES, p. 524.

EVIDENCE—EXPERT TESTIMONY.—In an action to recover damages for personal injuries a physician was permitted to answer the question, "From the history of the case as you learned it, and from your diagnosis, do you consider the injury permanent?" *Held*, reversible error. *Fed. Betterment Co.* v. *Reeves* (Kan. 1906) 84 Pac. 560.

If the defendant was not prejudiced by the form of the question, even though it was somewhat broad, its admission was not reversible error. *A. T. & S. F. R. R.* v. *Frazier* (1882) 27 Kan. 463. A physician may base his opinion in part on the patient's statements relative to his present, *Quaife* v. *Chi. & Nor. R. R.* (1879) 48 Wis. 521, and even past condition. *Eckles* v. *Bates* (1855) 26 Ala. 655; 3 Wharton & Stiles, Med. Juris. § 546. It is conceivable that a conclusion based on a personal examination of the patient and a description of the symptoms and condition by those in attendance might be competent. *R. R.* v. *Michaels* (1896) 57 Kan. 474; contra, *Heald* v. *Thing* (1858) 45 Me. 392. The court not only confuses the issue with considerations of hearsay, Wigmore, Ev. §§ 655, 688, but closes the door against the most useful sort of testimony.

EVIDENCE—HEARSAY—PEDIGREE.—In an action of trespass to try title it was established that the intestate whose heir the plaintiff claimed to be had unlawfully alienated his land to the defendants. The plaintiff to entitle himself introduced declarations of his great uncle that the intestate was never married. *Held*, that it was sufficient to show the declarant's relationship to the claimant. *Overby* v. *Johnston* (Texas 1906) 94 S. 131.

Greenleaf's statement that the admission of hearsay in pedigree cases depends on declarant's relationship to the person through whom the descent is traced is not borne out by the cases cited, Ev. 16th ed., 198, and is contrary to authority. *Monkton* v. *Atty-Gen.* (1831) 2 Russ. & Myl. 147; Hubback, Law of Succession, 32 Law Library, N. S. 458. If the theory of relationship be adopted the testimony was improperly admitted for it did not relate to claimant's family history. Wigmore, Ev. §§ 1500, 1502. But since Texas courts disregard the strict rule of *Johnson* v. *Lawson* (1824) 9 Moore 183, and permit strangers to testify under proper circumstances, *Lewis* v. *Bergess* (1899) 22 Tex. Div. App. 252, the principal case may be supported on the ground that the evidence related to the family history of the intestate. *Banning* v. *Griffin* (1812) 15 East. 293.

EVIDENCE—IMPEACHMENT OF WITNESS—EVIDENCE OF PREVIOUS CONSISTENT STATEMENTS.—The prosecuting witness, having denied making statements contradictory to his testimony, was impeached by evidence of such statements. The trial court then admitted testimony that he had made other statements consistent with his testimony. *Held*, the admission was reversible error. *Burks* v. *State* (Ark. 1906) 93 S. W. 983.

The question arising under this decision is one over which there has long been a division of authority. Starkie, Ev. Vol. I, 148; Gilbert's Ev. 6th ed., 150. The courts in admitting, *Packer* v. *Gonsalus* (Penn. 1815) 1 S. & R. 526, 536; *Graham* v. *McReynolds* (1891) 90 Tenn. 673, 697; *State* v. *Parish* (1878) 79 N. C. 610, or rejecting, *Nichols* v. *Stewart* (1852) 20 Ala. 358, 361; *Robb.* v. *Hackley* (N. Y. 1840) 23 Wend. 50, 56,

such testimony seem to presuppose that the making of the contradictory statements is to be considered as proved, the majority of the courts, induced by the plain irrelevancy of the testimony under such circumstances rejecting it. The fallacy of this reasoning is pointed out by Wigmore, §1126 et seq., in showing that in a consideration of this subject no such supposition must be made, but the question is as to the probative force of this testimony in disproving the testimony that the witness made the contradictory statements. *Lyles* v. *Lyles* (S. C. 1833) 1 Hill Eq. 76, 78; *Stewart* v. *People* (1871) 23 Mich. 63. Whether the testimony shall be considered as having such probative force lies within the discretion of the trial court. *Stewart* v. *People*, supra, 76. The action of the court in the principal case in arbitrarily rejecting this form of evidence is unsound on principle.

EXTRADITION AND INTERSTATE RENDITION—LIMITATIONS IN TRIAL OF PRISONERS.—Several indictments were found against the relator in the state of New York, under one of which he was convicted and imprisoned. He afterwards escaped and fled to Canada. Upon requisition under a different indictment from the one under which he was convicted, he was returned and then reimprisoned under the former conviction. *Held*, the prisoner was improperly retained under the former conviction. *In the matter of Browne* (Aug. 1906) 35 N. Y. L. Jour. No. 138.

The defendant, under indictment for a crime in New Jersey, was returned from New York under rendition proceedings. While held under indictment, a civil suit was instituted by the plaintiff. *Held*, the prisoner was subject to civil process. *Rutledge* v. *Krauss* (N. J. 1906) 63 Atl. 988. See NOTES, p. 522.

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—EXTENSION OF ORDINANCE.—A city ordinance granted rights to a telephone company in consideration of its agreement not to advance rates for telephone service within the city. The company extended its service into adjoining villages which had granted it the right to carry on business with no condition as to limit of time or fixity of rates. These villages were subsequently annexed to the city. *Held*, that the inhabitants of the annexed territory were entitled to the rates fixed by the ordinance of the city. *City of Chicago* v. *Chicago Telephone Co.* (Ill. 1906) 77 N. E. 245.

On the annexation of territory the ordinances or contracts designed for the city at large operate within the subsequently enlarged municipal limits, *St. Louis Gaslight Co.* v. *City of St. Louis* (1870) 46 Mo. 121, on the ground that it must have been contemplated that the city in the future might exercise its right of annexing territory, thereby extending its boundaries. *Indiana R. R.* v. *Hoffman* (1904) 69 N. E. 399. By this construction a violation of the constitutional provision as to impairing the obligations of contracts is avoided. The principal case is undoubtedly correct.

MUNICIPAL CORPORATIONS—GRANT OF EXCLUSIVE PRIVILEGES.—A municipal ordinance provided "that in consideration of the public benefit to be derived therefrom the exclusive right and privilege is hereby granted for the period of thirty years" to the waterworks company of operating a system of waterworks. *Held*, that the word "exclusive" excluded the city as well as private corporations from constructing and operating waterworks. *Vicksburg* v. *Vicksburg Waterworks Co.* (1906) 26 Sup. Ct. 660.

A city may exclude itself from entering the business of its grantee, *Walla Walla Case* (1898) 172 U. S. 1, but it must do so unambiguously, for it is a well settled rule that grants of franchises and special privileges are always to be most strongly construed against the donee, and in favor of the public. *Turnpike Co.* v. *Illinois* (1877) 96 U. S. 63, 68. Nothing passes by mere implication. *Slidell* v. *Grandjean* (1883) 111 U. S. 412, 438. But see *Brenham* v. *Water Co.* (1887) 67 Tex. 542. This rule has recently received a logical though harsh application where "the city

covenanted and agreed not to grant to any other person or corporation any contract or privilege to furnish water to the city," and these words were construed (four justices dissenting) to bar all other private corporations, but not to prevent the city itself from constructing and operating its own plant. *Water Co.* v. *Knoxville* (1905) 200 U. S. 22. In the principal case the court correctly held there was no occasion to invoke this rule.

PLEADING AND PRACTICE—LIMITATIONS OF ACTIONS—CAUSE OF ACTION ACCRUING AT DEATH OF DEBTOR.—The deceased contracted that upon his death, the plaintiff should receive all his personal property. The plaintiff brought suit to enforce the contract within six years of the taking out of administration, but more than six years after decedent's death. The defendant administrator pleaded the Statute of Limitations. *Held*, that the Statute of Limitations did not begin to run until an administrator was appointed. *Hoiles* v. *Riddle* (Ohio 1906) 78 N. E. 219.

In cases where it is impossible for plaintiff to bring his action by reason of an order enjoining suit, *Treasurer* v. *Martin* (1893) 50 Ohio St. 197, or rebellion, *United States* v. *Wiley* (1870) 11 Wall. 508, or pendency of an appeal, *Montgomery* v. *Hernandez* (1827) 12 Wheat. 129, the courts have refused to apply the Statute during such disability. Likewise, where a cause of action accrues to an estate the courts have refused to apply the Statute during the time between accrual and taking out of administration, because there is no one to institute process. *Cary* v. *Stephenson* (1694) 2 Salk. 421; *Murray* v. *The East India Co.* (1821) 5 Barn. & Ald. 204; Angell, Limitations, chap. 7. But where, as in the principal case, the cause of action accrues against an estate, it would seem that the letter and spirit of the statute require that the plaintiff should secure prompt administration and press his cause, rather than that he should be permitted to lie back allowing the statutory period to run, and then claim a suspension of the Statute. See *Richards* v. *The Maryland Ins. Co.* (1814) 8 Cranch 84. The principal case therefore seems unsound.

REAL PROPERTY—ADVERSE POSSESSION—CO-TENANTS.—A parol partition was made between co-tenants and each occupied his allotted part solely and exclusively for thirty years, making no claim upon the others, but recognizing their possession to be of right and hostile. *Held*, an ouster and adverse possession would be presumed. *Rhea* v. *Craig* (N. C. 1906) 54 S. E. 408.

An actual ouster brought to the notice, actual or constructive, of those ousted is essential to the validity of the claim of adverse possession as between co-tenants. *Clymer* v. *Dawkins* (1845) 3 How. 674. A legal presumption of this actual ouster is justified when the disseisor has continued in exclusive possession for the statutory period, without any claim from the other tenants who are under no disability to assert their rights. *Zapf* v. *Carter* (1902) 75 N. Y. Supp. 197; *Le Favour* v. *Homan* (1862) 3 Allen 354; *Dobbins* v. *Dobbins* (N. C. 1906) 53 S. E. 870. The presence of a parol partition goes still further to justify the presumption of ouster, since it adds to the likelihood of the disseisor's original hostile intent. The principal case is therefore sound. In New York the same result is reached by a different course of reasoning, the courts holding that such part performance as there shown is sufficient to prevent the operation of the Statute of Frauds. *Wood* v. *Fleet* (1867) 36 N. Y. 499.

REAL PROPERTY—INTERPRETATION OF DEEDS—BOUNDARIES.—Deeds described lines as starting "from a stick in a fence beside the road, and running parallel to the fence." The location of the stick was unascertainable. *Held*, title passed to the road centre. *VanWickle* v. *VanWickle* (N. Y. 1906) 77 N. E. 33.

Intent of the grantor to convey to the road centre in such cases is always presumed. *City of Boston* v. *Richardson* (1866) 13 Allen 146; *Matter of Ladue* (1890) 118 N Y. 213. Some cases explain this presumption by comparing such a boundary to a wall or any other monument having

breadth. *Child* v. *Starr* (N. Y. 1842) 4 Hill 369, 382; *White's Bank* v. *Nichols* (1876) 64 N. Y. 65. This line of decisions adds greatly to the confusion, *King's Co. Fire Ins. Co.* v. *Stevens* (1882) 87 N. Y. 287, with regard to what words are necessary to rebut the presumption which exists by the general view, because of the improbability of the grantor's retaining a "gore" useless to himself. *Bissell* v. *The R. R.* (1861) 23 N. Y. 61; *The Seneca Nation of Indians* v. *Knight* (1861) 23 N. Y. 498; *Holloway* v. *Southmayd* (1893) 139 N. Y. 390. Under this view, sound on authority, 3 Kent Com. 433, it is obvious that the presumption is stronger than under the view entertained in *Child* v. *Starr*, supra, and that the presumption should only disappear when there are strict words of exclusion used, *Hiberman* v. *Baker* (1891) 128 N. Y. 253; 3 Kent Com. 433, or circumstances are shown which render the gore as useful to the grantor as to the grantee. *Mott* v. *Mott* (1877) 68 N. Y. 246. The decision in the principal case, although inconsistent with some cases, see *Jackson* v. *Hathaway* (1818) 15 Johns. 447; *White's Bank* v. *Nichols*, supra; *King's Co. Fire Ins. Co.* v. *Stevens*, supra, is in harmony with this view and should be followed.

REAL PROPERTY—UNRECORDED DEED—SUBSEQUENT BONA FIDE PURCHASER.—Property was conveyed to the defendant by warranty deed, which was not filed for record until after his grantor had conveyed by deed a portion of the same property to the plaintiff who had neither actual nor constructive notice of the prior deed to the defendant. The subsequent deed was not filed until some time after the first deed was recorded. *Held*, that the statute not requiring prior registration of the subsequent deed to give it priority, such prior registration is immaterial. *Swanstrom* v. *Washington Trust Co.* (Wash. 1906) 83 Pac. 1112.

The recording acts in most states provide that a junior purchaser must first record his instrument in order to secure protection against prior unrecorded conveyances. *Den* v. *Richman* (1832) 13 N. J. L. 43. See Devlin, Deeds, 2nd ed. §§ 576, 625. This provision tends to secure prompt registration and affords ready means of determining questions of priority. Since, however, the primary purpose of recording acts is to protect subsequent purchasers, *Stuyvesant* v. *Hall* (1847) 2 Barb. Ch. 151, 158, when the statute does not require priority of registration, such priority is immaterial. The principal case is sound. *Stafford* v. *Lick* (1857) 7 Cal. 479; *Drew* v. *Streeter* (1884) 137 Mass. 460.

RECEIVERS—COMITY—RECOGNITION IN FOREIGN JURISDICTION. — The plaintiff, regularly appointed as receiver of an insolvent corporation and invested with the usual powers of a receiver in chancery, applied for and received permission to sue in the court of another jurisdiction. The defendant demurred on the ground that the receiver had no power to sue in a foreign court. *Held*, the demurrer should be sustained. *Fowler* v. *Osgood* (C. C. A. 8th Cir. 1905) 141 Fed. 20. See NOTES, p. 521.

SALES—STOPPAGE IN TRANSITU—DELIVERY.—An unpaid vendor addressed goods to the store of the vendee. A local freight delivery company carried the goods from the railroad station to the store, and finding the store closed because of the bankruptcy of the vendee held the goods in storage. *Held*, that the right of stoppage in transitu was not yet ended. *In re Burke & Co.* (1905) 140 Fed. 971.

The early ruling that the only delivery efficient to extinguish the right of an unpaid vendor to stop goods in transitu is one into the corporate touch of the vendee, *Hunter* v. *Beale* (1785) cited in 3 T. R. 466, has been modified so that possession by or delivery to an agent representing the vendor fully, and not merely as a forwarding agent, *Aguirre* v. *Parmelee* (1853) 22 Conn. 473, or as a mere carrier on his account, *Dixon* v. *Baldwin* (1804) 5 East 175, 183, acting within the originally contemplated transit, is now sufficient. *Reynolds* v. *R. R.* (1862) 43 N. H. 580, 590; see note 60 Am. Rep. 51. A local delivery company being

a common carrier, *Robertson* v. *Kennedy* (Ky. 1834) 2 Dana 431, and acting within the contemplated transit when the goods were addressed to the store, the principal case is sound.

STATUTES—NEW YORK USURY LAW—STATE BANK AS BONA FIDE HOLDER FOR VALUE.—A state bank became a bona fide holder for value before maturity of two usurious notes drawn between individuals. *Held*, that, notwithstanding the notes were void in the hands of individuals, the construction of the State Banking Law in the light of the National Banking Law as required by the former's intendment clause, to avoid discrimination between national and state banks, permitted the bank to recover on the notes. *Schlesinger* v. *Kelly* (1906) 35 N. Y. L. Jour. No. 92. See NOTES, p. 519.

STATUTE OF LIMITATIONS—POWER OF SALE IN MORTGAGE.—A note payable in four years was secured by a mortgagee containing a power of sale. After the death of the original parties, the statute having run against the mortgage, the administrator of the mortgagee advertised a sale under the power. *Held*, the sale would not be enjoined. *House* v. *Carr* (N. Y. 1906) 78 N. E. 171. See NOTES, p. 528.

TORTS—ASSUMPTION OF RISK A DEFENCE IN ACTION FOR INJURY BY WILD BEAST.—The defendants were common carriers who had on their dock, awaiting delivery, four caged bears. The plaintiff, a child of nine, of average intelligence, who had come to the dock expressly to see the bears, went between the cages and stood within eighteen inches of one of these, which had a considerable opening. The bear in this cage struck the plaintiff and inflicted great injury upon him. *Held*, that the plaintiff had brought the injury upon himself and could not recover. *Malloy* v. *Starin* (1906) 35 N. Y. L. Jour. 1071.

Since the gravamen of the action for injuries inflicted by a wild beast is not the owner's negligence, but "the keeping of the animal after knowledge of its mischievous propensities," *Spring Co.* v. *Edgar* (1878) 99 U. S. 645, contributory negligence is not a defence. *Lynch* v. *McNally* (1878) 73 N. Y. 347. Yet it would seem that the doctrine of assumption of risk, as distinguished from contributory negligence, would apply as a defence in the principal case. For whoever understands a danger, and voluntarily assumes the risk of it, has no action against the one who is responsible for the existence of the danger. *Drake* v. *Auburn City Ry.* (1903) 173 N. Y. 466.

TORTS—LIBEL—LIABILITY OF EDITOR-IN-CHIEF OF NEWSPAPER. — The defendant was editor-in-chief of a newspaper owned by a corporation and had general supervision of the news department, which was under the immediate charge of a subordinate editor. A libel was published during the defendant's absence and without his knowledge or complicity. *Held*, that the defendant was not liable. *Folwell* v. *Miller*, N. Y. L. Jour. June 22, 1906.

It has been held by the great weight of authority that an editor with powers of general supervision is liable equally with the proprietor of a newspaper for a libel printed therein, although he was ignorant of it. *Smith* v. *Atley* (1896) 92 Wis. 133; *Nevin* v. *Speickermann* (Pa. 1886) 4 Atl. 497; *Belo* v. *Fuller* (1892) 84 Tex. 450. It is a general rule of law, however, that an intermediate agent is not liable to third persons for acts of malfeasance or non-feasance of his sub-agents in which he did not participate. *Paper Co.* v. *Dean* (1877) 123 Mass. 267; *Bath* v. *Caton* (1877) 37 Mich. 199; *Murray* v. *Usher* (1889) 117 N. Y. 542. The weight of authority avoids this general rule on the ground that a failure in an editor's duty of supervision amounts to a misfeasance, but the principal case applies it and refrains from turning what appears to be pure negligence into a positive tort.

TORTS—MALICIOUS PROSECUTION—MALICIOUS INSTITUTION OF BANKRUPTCY PROCEEDINGS.—The defendant instituted and prosecuted a proceeding in involuntary bankruptcy without probable cause and with a malicious intent. No seizure of property was made. *Held*, an action for malicious prosecution would lie. *Wilkinson* v. *Goodfellow Shoe Co.* (C. C. 1905) 141 Fed. 218.

Although since *Savile* v. *Roberts* (1698) 1 Ld. Raymond 374, such actions have been allowed on the ground that the plaintiff has suffered loss of credit and fair fame, yet arrest or seizure of property has almost always been present. The court in the principal case argued on the broad ground that the plaintiff's loss of credit alone sufficed to entitle him to an action, supposing its decision to be the first where there was no element of arrest or seizure. While it is the first in this country, the cases of *Chapman* v. *Pickersgill* (1762) 2 Wilson 145, and *Whitworth* v. *Hall* (1831) 2 B. & Ad. 695, are precisely in point, neither containing any indication that a seizure occurred. As an attack on credit violates a property right, the principal case is sound, even in a jurisdiction where arrest or loss of property is required to ground an action. See 2 COLUMBIA LAW REVIEW 124; 3 id. 479; 4 id. 516; 1 Addison, Torts, 6th ed. 292; 1 Hilliard, Torts 467.

TORTS—UNAUTHORIZED TELEGRAM—UNDISCLOSED PRINCIPAL OF ADDRESSEE.—The plaintiff vendor was to withhold delivery until the vendee's bank vouched for vendee's check by a telegram to the plaintiff's bank. Acting on a telegram sent to the plaintiff's bank by the vendee unauthorized by his bank and negligently accepted by the defendant company, the plaintiff suffered loss. *Held*, that the defendant owed no duty to the undisclosed principal of the addressee to exercise reasonable care to receive and transmit authorized messages only. *West. Un. Tel. Co.* v. *Schriver* (1905) 141 Fed. 538.

Upon principle and by weight of authority no recovery can be had by the undisclosed principal on the theory of a beneficiary under the contract, *West. Un. Tel. Co.* v. *Wood* (1893) 57 Fed. 471, nor on a false representation. A recovery on the general principles of actionable negligence, however, seems defensible, though rarely allowed. A telegraph company owes a general duty to the public to use reasonable care in accepting and sending messages. *Tel. Co.* v. *Griswold* (1881) 37 Ohio St. 301. Damage to any person having a right to act in reliance upon a telegram is a natural and probable consequence of negligence in sending such telegram. The undisclosed principal of the addressee should, therefore, recover. Contra, *Lee* v. *West. Un. Tel. Co.* (1892) 51 Mo. App. 375. Cf 5 COLUMBIA LAW REVIEW 169.

WATERS AND WATERCOURSES—DRAINAGE INTO NATURAL STREAM—POLICE POWER.—A writ of mandamus was sought to compel the railroad to increase the size of a bridge over a natural watercourse so as to allow the drainage district commissioners to deepen the channel in order to drain adjoining lands and render them tillable. *Held*, that mandamus should have issued. *Chicago, B. & Q. R. R.* v. *Illinois* (1906) 26 Sup. Ct. 341.

The right of a riparian owner to drain into a natural watercourse has generally been held limited by the natural capacity of the stream. 1 COLUMBIA LAW REVIEW 560. But see *Mizell* v. *McGowan* (N. C. 1901) 85 Am. St. Rep. 705 and note. As the bridge in question allowed for the natural flow of the stream the argument of the court that the railroad was bound to anticipate and provide for any legal increase of the waterflow seems beside the point. In view, however, of the police power having been already extended to include regulations designed to promote general prosperity, *Lake Shore, etc. R. R.* v. *Ohio* (1899) 173 U. S. 285, the decision of the principal case is supportable.

WATER AND WATERCOURSES—SURFACE WATERS—DUTY OF LOWER PROPRIETOR.—The defendant constructed, entirely on his own land, then boggy, a ditch of such a pitch or decline that "by the accelerated flow

of the surface water more soil was carried away from the general surface of plaintiff's land than would otherwise have occurred," resulting in gullying plaintiff's land. *Held*, the defendant was not liable, his sole duty being the "acceptance at all times of the water to the extent of the natural flow." *Pohlman* v. *Chicago, M. & St. P. R. R.* (Iowa 1906) 107 N. W. 1025.

In Iowa the civil law rule as to surface waters prevails, that the owner of higher land may drain to lower levels and the lower proprietor is bound to receive the natural flow; but the upper proprietor "cannot make on his land any works which would change the natural passage (immission) of the waters upon the inferior estate, by collecting it upon a single point, and giving it thereby a more rapid current, and more apt to carry down sand, earth or gravel upon the land." *Livingston* v. *McDonald* (1866) 21 Ia. 160, citing 1 Duranton No. 164. It would seem that if the upper proprietor is thus bound to restrain surface water to its natural flow in casting it on a lower tenement, the lower tenant would be bound by a like duty to his upper neighbor. The intimation of the court in the principal case that "an estate owner, in making disposition of water, may by drainage measures hasten or accelerate the flow as against his lower proprietor," is contradicted by the Livingston case.